

Machkevitch v Andrew Building Constructions [20120] NSWSC 546.

FACTS

In March 2010 the Defendant (Andrew Building Constructions) entered into a written contract and Bnus deed with 873 NSHR Investments Pty Ltd (the proprietor). The Builder took a claim to adjudication under the Building and Construction Industry Security of Payment Act 1999 (the Act) and a determination was made in the Builder's favour. The proprietor then went into liquidation. The Builder now claims that it made a "construction contract" with Mr Machkevitch (the Plaintiff) where the Plaintiff would pay in the event the Company did not. The Plaintiff seeks to restrain the prosecution of the payment claim served on him and associated declaratory relief.

ISSUES

1. Whether a vertical "arrangement" amounted to a construction contract for the purposes of the Act?
2. Whether the builder is estopped, because of the first adjudication, from pressing its claim under the alleged construction contract?
3. Whether the builders attempts to press its payment claim against Mr Machkevitch is an abuse of the processes of the Act?

FINDING

McDougall J firstly agreed with previous decisions where a construction contract could amount to an "arrangement" that would not be enforceable at law but would be one which one party agrees to undertake to carry out construction work for another party to it. It must give rise to an engagement or state of affairs which may impose an obligation to pay for the construction work. McDougall J was found that there was an arrangement between the Plaintiff, on his own behalf and on behalf of the proprietor based on a conversation between the Plaintiff and the Defendant where Mr Machkevitch promised the Builder that he would pay him if the proprietor did not.

This conversation amounted to an arrangement and in turn an obligation to pay.

The fact that the Builder submitted two payment claims gave rise to the question to possible abuse of process. McDougall J was of the opinion that it was reasonable for the Builder to seek to enforce the secondary liability based on the Plaintiffs promise to pay in the event that the Proprietor didn't pay. The circumstances differ for each claim even though they were for the same amounts and therefore it was not necessary to elaborate any further on the issue.

QUOTE

McDougall J stated at para [29]: *"the meaning given to the word ("arrangement") must depend on an analysis of its place in the particular legislative scheme which is under consideration and by reference to the context in which it appears... the word "arrangement" denotes some engagement, or state of affairs, or agreement (whether legally enforceable or not) under which, perhaps among other things, one party undertakes to perform construction work for another."*

IMPACT

Construction contracts under the Act includes any arrangement which gives rise to an obligation to pay for construction work. Contract Managers should be careful to ensure that they understand and discharge obligations under the Act.

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